No. 8117

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FERRYBOATMEN'S UNION OF CALIFORNIA (an unincorporated association), FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY and THE WESTERN PACIFIC RAILROAD COMPANY,
Appellees.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

FERRYBOATMEN'S UNION OF CALIFORNIA (a nonprofit corporation), and C. W. DEAL,
Appellants,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY,
Appellee.

APPELLANTS' REPLY BRIEF.

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Subject Index

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APPELLANTS' REPLY BRIEF.

As the brief for appellees raises new matter (including an issue not covered by the pleadings or findings) and as certain other matters require comment, we feel that the

importance of this case justifies a short reply brief on behalf of appellants which we trust will aid the court in coming to its conclusions.

On the main point in the case we showed in our opening brief that plaintiffs rely on a judgment abolishing 12-hour watches as of a retroactive date, and hence entitling them to overtime for the last 4 hours of each 12-hour watch.

The judgment and the award in this regard are plain and explicit. The carriers in reply do not even pretend to have complied with the plain provisions of the judgment, but defend the "adjustment" made by them by argument irrelevant to the question as to whether or not they carried out the judgment. We shall discuss each point in this brief seriatim and show how plainly appears the utter failure to observe the requirements of the judgment.

I.

There Was No Conflict of Testimony.

The carriers open their discussion by quoting a number of findings most of which pertain to matters not in dispute. They justify this by claiming our statement of the facts to be 'inaccurate" and claiming particularly that there was "sharp conflict" in the testimony as to certain respects which they promise to "designate". We fail to find any such designation and can find no instance of conflict of testimony.

True, the carriers claim their method of adjustment is proper, but, what the carriers actually did, is not in dispute, although there is dispute as to whether or not what

they did complies with the judgment. Disputes as to legal effect can not change our statement there was no conflict at all as to the facts involved.

Throughout their brief carriers declare that the court made certain decisions and findings and in effect held the method attempted by the carriers to be a correct one. In this connection it should be pointed out that most of the findings were as to matters regarding which there was no dispute between the parties.

As to the merits of the case, the court takes the most unusual course of merely stating the contentions of both parties and then without analysis or argument or discussion proceeds to state that upon consideration of all of the facts and circumstances it is inclined to be of the opinion that the compensation was fairly made. The fact that the judge believed that the extra compensation was fairly made does not answer the problem. The question was whether or not the employees received all they were legally entitled to under the judgment. The court's opinion that they received a fair amount does not answer the question. The court does not attempt to show that the method attempted by the carrier was proper nor did the court in its opinion indicate wherein the contention of the employees was legally unsound.

In fairness to the trial court, however, it should be stated that no briefs were filed. The case was orally argued and the oral argument written up, but we feel confident had the matter been presented in briefs to the trial court, it would have come to a different conclusion.

II.

The Issue on the Merits is: Did the Carriers Pay the Wages Required by the Judgment? It is No Answer to Say that to do so Would Give the Men "Additional Pay" or an 18% Higher Rate. The Differential in Fact Was Caused by the Carriers Failing to Observe the Award.

The judgment required the 12-hour watches to be abolished as of March 1, 1928 (R. p. 31). In fact it is admitted the 12-hour watches continued for six months thereafter, that is, March to August, 1928 (R. p. 57) and this is the period in controversy.

As will be remembered from our opening brief (p. 17) the carriers originally agreed to put this part of the award into effect immediately after its rendition, that is "the first day of the month following the date on which the award is filed" (R. p. 86).

When the carriers signed this agreement they knew that any appeal to the courts would take more than a month and obviously made this agreement to settle what rule should be in force pending any appeal.

Notwithstanding this agreement, they refused to assign the 12-hour men to 8-hour watches, but assigned them to the same previous 12-hour watches, which, as already seen (appellants' opening brief p. 27) meant an assignment of 20-21 watches a month instead of the normal 26-27 watches per month, but meant a good many more hours per month.

But the men worked all the assignments made by the company (R. pp. 249, 277, 280), and if the company chose to gamble that they could reverse the award, in spite of their written agreement which in effect obliged them to

observe the award pending an appeal, they cannot now complain that their failure to make normal assignments caused the men to receive a monthly salary for less assignments than they could have been asked to work.

The Carriers' Argument Depends Upon the Theory that the Appeal "Suspended" the Award and Wiped Out the Agreement to Observe the Award Immediately.

The carriers declare that they were justified in ignoring the award during the six months in controversy, because (Carriers' brief p. 33):

> "During that six months the award was suspended."

This contention is the heart of the carriers' case and all of their arguments are based on it. The contention in various forms is repeated throughout the brief and once the fallacy of this point is seen, the weakness of the position of the carriers becomes manifest.

The carriers argue that the award was "suspended" and that therefore it was legal to assign the men to 12-hour watches.

If the award could be said to be in "suspense" pending an appeal to the courts, such suspense would merely mean that during such period the carriers could not be compelled by legal machinery to put the award into effect, although their agreement required them so to do. Upon the expiration of the period of suspense, the carrier would then have to put the award into effect *retroactively* as of March 1, 1928, covering the period of suspense as the judgment so provides. The carriers, however, in their brief take the position that the alleged period of suspense

gave them not only the right to disregard the award during such suspense but also that even after the suspense ended, they were not required to comply with the award retroactively for the suspense period but only from and after the expiration of the suspense period. This theory is not merely contrary to the judgment, stipulation of the parties, arbitration agreement, but also to the carriers' own conduct. For the carriers have always contended that under the Hancock formula they did comply with the award retroactively for the suspense period.

But if the award was suspended, why did the carriers make any adjustment at all! If 12-hour watches were legal, then the former 12-hour rate was legal too, and there was no necessity to raise the 12-hour men to the hourly rate of the 8-hour men.

The carriers argue that to give the abolition of 12-hour watches a retroactive effect it is sufficient to give the men the higher rate of the 8-hour men.

But the rate of pay is only part of the award; the length of the watches is a more important part. The carriers have no right to say that part of the award is suspended and part is not. There is no justification for giving part of the award (the rate part) effect and at the same time ignoring the part which fixes the length of the watch.

At page 42 the carriers repeat the contention that the award was "in suspense". They then admit (p. 43) that under Rule 8 the monthly salary covered "the present recognized straight time assignment" but go on to say (p. 44) that the 12-hour men "were not, in any sense" 8-hour men.

This statement is true only if the award was "in suspense". But the judgment requires the award to be effective and hence all men must be treated as if they were 8-hour men and hence the last 4 hours of each 12-hour watch is overtime.

The carriers ask (p. 43) "why should the company pay the 12-24 hour men a month's pay for 20 or 21 eight hour watches?"

The answer is: Rule 8 gives the men a monthly salary for straight time assignments. The company could have assigned more watches for the same monthly salary but preferred to gamble on a reversal in which case it would have gotten the last 4 hours of each 12-hour watch without additional pay, and would have gotten more hours per month for the same salary (as 12-hour watches aggregate to a larger total although there are less watches per month than if 8-hour watches are assigned).

They lost the gamble and are trying to make the men bear the brunt of it.

There is No Justification For Treating Any Part of the Award "as Suspended". The Judgment Expressly Requires the Carriers to Give Retroactive Effect to the Rule Abolishing 12-Hour Watches.

The judgment dated September 29, 1928, declares (R. p. 31):

> "The rule pertaining to hours of service (and in said Award denominated as Rule 6) as re-written in said Award shall become **effective as and from March 1, 1928,** * * * reading as follows:

'Hours of Service.

Rule 6.

Assigned crews will work on the basis of eight (8) hours or less on watch each day for six (6) consecutive days.' ''

The judgment declares that the carriers (R. p. 33)

''shall pay all overtime due or to become due in accordance with said Rule 8, said rule reading as follows:

'Overtime.

Rule 8.

The monthly salary * * * shall cover the present recognized straight time assignment. All service hourage in excess of the present recognized straight time assignment shall be paid for in addition to the monthly salary at the prorate rate.' ''

The judgment goes on to require the carriers (R. p. 34) to

''make such orders and issue such instructions as will **put such wages and rules into effect as of the effective dates above mentioned** * * * and as will cause all of said employees to be paid all back pay retroactively or otherwise due to said employes or any of them.''

In the face of the plain language of the judgment declaring that Rule 8 to have been in force as of March 1, 1928, how can the carriers argue that the award was ''suspended'' during the six months' period commencing on that date.

Any Failure to Work "Six Consecutive Days" or 26-27 Watches is Due Entirely to the Refusal of the Carriers to Make Such Assignments. The Men Worked Every Assignment Made by the Company.

The carriers say (p. 33) the men worked 12-hour watches because court proceedings were pending. That is not correct. They worked 12-hour watches because the company in violation of the arbitration agreement (R. p. 86) required 12-hour assignments, and the men had to accept the action of the carriers or quit work (R. p. 288).

12-hour men were assigned less watches per month than 8-hour men. Were it not for the award, this would have been proper, and the last 4 hours of each watch would not be overtime.

But, having chosen to gamble on reversing the judgment, the carriers made less assignments than they were entitled to make under the award. They did this in an attempt to avoid paying overtime for the last 4 hours of each 12-hour watch and to get the larger aggregate of hours involved in 12-hour assignments; 8-hour men aggregated 208 or 216 hours per month (8 times 26 or 27 watches) while 12-hour men aggregated 240 or 252 hours per month (12 times 20 or 21 watches).

Hence, since both groups of men got the same monthly salary, the hourly rate of the 12-hour men is declared by the carriers to be 18% higher if paid as called for by the court. But this is due entirely to the failure of the carriers to work the men full assignments on 8-hour basis.

The 18% is obtained by ignoring the fact that the company failed to assign the men all the normal 8-hour assignments.

The men do not get any higher rate, unless such hourage is eliminated. But, if the rate is higher, it is the fault of the carriers who could have had the additional watches by making the additional assignments, and thereby avoiding overtime. The overtime is what causes the alleged 18% differential. Under the monthly salary the men could and should have been asked to work 26-27 watches of 8 hours. Instead, the company assigned 20-21 watches per month (of 12 hours each). But the company made the assignments, not the men (see discussion and citation to the record at p. 27 of our opening brief).

The overtime arose out of the fact that the carrier assigned the men to 12-hour watches. But for the award the 12-hour watches would have been legal. The award in abolishing the watches made the last 4 hours overtime. The carriers insisted on making assignments which under the award constituted overtime.

Of course adding overtime to the monthly salary gives the men additional pay. Prorating this additional pay over the hours worked is the method by which the carriers arrive at their 18% differential.

But there is no differential in fact. One group was assigned overtime hours and the other group was not.

Again the fallacy of the carriers' position lies in failing to recognize that after March 1, 1928, 12-hour watches were improper and were not "in suspense".

Repeatedly throughout the brief the carriers complain that the 12-hour men are not entitled to regular pay plus overtime on the 8-16 hour basis because they did not work "six consecutive days". It must be remembered however

that the rule providing for the monthly salary declares that it should be for "the present recognized straight time assignment". It is without dispute that it was the company and not the men which made the assignments during the period in controversy (R. p. 249). It was the company that chose to make the assignments in the particular way complained of (R. p. 277). If the carriers wanted to make the objection that the men did not work the full assignments—26 to 27 watches, or six consecutive days—they could and should have made such assignments.

The carriers cannot by failure to make the proper assignments complain that the men did not work additional watches to which the company did not see fit to assign them. It was the company that insisted on the particular assignments which the men worked, and as said by the representative of the men (R. p. 288), "It is not our fault * * * if you did not see fit to assign the men * * * you assigned them so many watches per month for which they paid the monthly wage * * * The company assigned the watches. The men either had to work on them, or not work".

If the contention of the carrier in this respect is sound, they can in any situation ignore the award by failing to make the proper assignments and then blame the men for working only the assignments which the company made.

The Arbitration Agreement Required the Carriers to Observe the Award While the Case Was Pending on Appeal. Had the Carriers Observed Their Agreement the Present Difficulties Could Not Have Arisen.

The carriers claim that they had to ignore the award in order to preserve their rights on appeal. But this argument is not justified by the facts.

When they signed the agreement to make the award effective immediately (i. e., at the end of the month, R. p. 86) they knew that either side could appeal to the courts. They knew this because the agreement provided that the award should be filed in the district court (R. p. 86). The agreement was made and proceedings had pursuant to the Railway Labor Act, as the carriers admit (R. p. 43). That act provides for hearings before the district court and an appeal to this court (45 U. S. C. §159). Obviously these court proceedings and appeal would require more than a month.

Hence when the carriers agreed to make the award effective on "the first day of the month following the date on which the award was filed" (R. p. 86) they knew it would take months to determine any appeal to the courts. Therefore they cannot argue that the award was "suspended" in the face of a plain agreement to make it "effective" at once.

The carriers argue they had a right to appeal. Certainly they had a right to appeal. But, pending any appeal some rule had to be observed in practice, either the rule contended for by the men, or the rule desired by the carriers.

The arbitration agreement decided that question by requiring to be observed whatever rule was set out in the award.

Had the rule been in favor of the carriers, they certainly would have claimed the right to follow the award pending any appeal by the men.

III.

The "Hancock Formula" is Not Justified by the Judgment or the Award.

Under this heading the carriers repeat their contention that by appealing to the courts, the award was suspended. Only this time they state (p. 45) that the court proceedings "resulted in a preservation of the status quo". The fallacy of this argument and its inconsistency with the written agreement of the carriers and the provisions of the judgment, has just been discussed by us.

At page 46 the carriers repeat the contentions that during the period in controversy "they were working under the, as yet, unmodified contract which in section 6 specifically provided for 12-24 hour assigned watches".

If this be true, what of the agreement to observe the award immediately, what of the judgment abolishing 12-hour watches?

The carriers admit that all the "Hancock formula" did was to equalize "the hourly and daily rate" of wages. But more than equality of rate is involved. The equality of length of watches is just as important an element. Making one man work a checkerboard of 12 hour watches

is not the same as regular 8-hour watches even though the hourly rate be the same.

It is true, as said by the carriers (p. 49) "one of the objects of the arbitration was to equalize the hourly pay of the two classes". If that were the only reason, it would have been a simple matter to retain 12-hour watches and raise the hourly rate to an "equalized" basis. The fact is, however, that the only way the men could be "equalized" was to give them all the same watches. In fact the men claimed that the main reason for the arbitration was the abolition of the 12-hour watch system (R. p. 279). The award did abolish such watches.

IV.

The Claim of So-called "Misstatements" is Based Entirely on Our Refusal to Accept the Carriers' Contention that the Award Was "Suspended" When the Carriers Chose to Ignore Their Written Agreement to Observe it.

When we read the opening part of the carriers' brief we were amazed that our good friends saw fit to charge that our statement of the case was "in important respects, inaccurate" (p. 2). Counsel went so far as to charge that we erred in stating there was no conflict of testimony. Counsel were so bold as to state that "there was sharp conflict in the testimony in a number of respects *we shall designate*".

We have read the brief carefully but evidently counsel could discover nothing to "designate" as we find no conflict of testimony referred to anywhere in the brief, for the carriers. Of course there is plenty of conflict of opinion between counsel but not of testimony.

Therefore, we repeat the statement questioned in our brief (p. 5):

> "On the merits of the controversy, there was no conflict of testimony. There is no real dispute as to the hours worked by the men or the amounts paid them or the method pursued by the carriers in making the amounts paid."

We made this statement deliberately and feel in fairness the carriers should now admit that it was a correct statement.

At page 50 under heading IV the carriers declare our brief to be "pervaded by misstatements and misapplications of the rules".

Ordinarily we would pass by such statements as lawyers' poetic license or as the hyperbole which too often is invited by the heat of forensic display. However, we stop to challenge these remarks, not to justify ourselves by the record—our page references to the transcript do that—but because the so-called "misstatements" emphasize the fundamental misconception of the carriers' case, namely, that the carriers could by their own unilateral action "suspend" the award. Of course if the award was "suspended" many of our statements are incorrect because we are innocent enough to believe that where a judgment says something it means what it says until reversed or modified. We also assume that a written agreement that an award be "effective" at once means just that and not that either party can "suspend" it for reasons of his own.

The first "correction" illustrates what we mean. On pages 25 and 26 of our brief we quoted Rule 8 declaring

that the monthly salary covered "the present recognized straight time assignment" and excess hourage was overtime. We then argued that as the award abolished 12-hour watches, the only straight time here involved was for 8-hours. On page 26 we repeat and summarize our argument by stating that the men got a monthly salary for straight time, and overtime for hourage in excess.

On the basis of this statement of our position we are accused of misstating the record, being told that the men were not on 8-hour assignments but that (Carriers' brief p. 50)

> "they were on a 12-24 hour basis, which was a 'recognized straight time assignment' during those six months."

In other words, the carriers insist that the award was "suspended" during those six months and hence 12-hour watches were effective. But, as already seen, we are dealing with a judgment calling for 8-hour watches retroactively and it begs the question to assume that 12-hour watches were proper notwithstanding.

This is typical of the "misstatements" charged against us. We submit that our good friends should have used other language in characterizing our refusal to agree to their theory that unilateral action could suspend the written agreement to observe the award immediately and our refusal to agree that where a judgment says 12-hour watches shall be abolished as of a certain date that notwithstanding such watches are legal and proper.

The next "correction" is to the same effect (Carriers' brief pp. 50-51). They refer to our quotation by Hancock himself that hourage in excess of assigned 8-hour watches

is overtime by declaring regular assigned hours were "twelve hours—not eight hours". This again begs the question. It represents a difference of opinion, but certainly does not justify an accusation of misstating the record.

Other "corrections" are made in the same vein until finally the basis for this is stated in so many words. Say the carriers in their brief (p. 54):

> "During the six months in suit the award was in suspense; the old Rule 6 remained in effect * * * and 12-24 hour watches were entirely proper."

We have gone into the alleged "misstatements" not to show we properly stated the record, but to emphasize the fallacious theory underlying the carriers' whole case; that even though the judgment abolished 12-hour watches for the period in question yet they "were entirely proper".

If so, that is the end of our case, and the carriers should not have paid us even the checks they did give us. But the judgment says as of March 1, 1928, there were only 8-hour watches and if so, 12-hour watches could not have been "entirely proper" and the men are entitled to overtime for the last 4 hours of each 12-hour watch.

V.

Laches Was Not Pleaded by the Carriers and the Defense is Neither Available Here Nor Justified by the Facts.

The carriers have a two page heading on the subject of laches. But this defense was not pleaded, no issue was raised on it and the facts referred to by carriers show that it is not a proper element in this case.

Had the issue been raised we would have shown the energetic steps that were taken in the state courts which have come to naught because the Superior Court erroneously accepted the carriers argument that the state courts had no jurisdiction. We were dealing with a situation without precedent, made difficult by the carriers repudiation of their written agreement to make the award effective immediately.

The carriers have shown no injury by our availing ourselves of the full period allowed by the statute of limitations. They have the money we claim is due the men for wages.

We did not offer to restore any moneys received as the carriers now admit and always have admitted that what was paid is the least due the men.

The carriers were not being surprised as they admit (Brief, p. 59) they received written demands for the full wages due on January 9, 1929, a few months after the checks were made. The litigation in the state courts certainly apprised them of the contentions later made here.

It is true that the court pointed to the nearly five years delay in the federal court. But had an issue been presented and facts heard we are confident it would not have made the remark about laches.

In fact the carriers thought so little of the suggestion of laches that they presented no finding on it and none was signed.

VI.

The Claim Under the Judgment is for a Liquidated Amount: the Judgment Fixed the Rate of Pay and the Hours Involved Were Not in Dispute so that the Amount Due Was Merely a Matter of Arithmetic.

Under this heading the carriers argue that those portions of the judgment directing payment of overtime "are merely surplusage" (p. 64).

But those portions of the judgment are just as much part of the judgment as any other part of it. The last two paragraphs thereof read (R. pp. 33, 34):

> "It Is Further Ordered, Adjudged And Decreed that the * * * carriers * * * shall pay all overtime due or to become due in accordance with said Rule 8 * * *
>
> It Is Further Ordered, Adjudged And Decreed that the above named carriers shall * * * cause all of said employees to be paid all back pay retroactively or otherwise due to said employees or any of them in accordance with said award and this judgment, and respondent shall have its costs herein as taxed in the sum of ———— Dollars."

This is a judgment. No appeal was taken from it. No attempt was made to modify it or attack it as in excess of jurisdiction. Therefore it is binding upon the parties.

Note that "respondent" to-wit: the Union, is the party in whose favor costs are awarded. Counsel ask why therefore the Union took assignments from the men. The answer is obvious. We were dealing with a situation without precedent. We could take no chances on technical objections. By having the men assign whatever rights they had to the Union we prevented any argument as to proper parties.

The carriers argue that the claim of the men was unliquidated. But the judgment fixed the rate of pay. There was no dispute as to the hours worked because prior to the bringing of proceedings in the federal court the carriers had furnished us a statement of the hours involved to which we agreed so that all that was left was a matter of arithmetical calculation.

VII.

There Was No Accord or Satisfaction.

The carriers make no argument which was not anticipated in our opening brief. Nor do they dispute our statements of the law. They do attempt to distinguish our cases and cite various decisions in which the court found as a fact the existence of an accord.

We too could multiply cases in which the court found as a fact the nonexistence of an accord.

The real question is as to the application of elementary principles to the facts here.

In our opening brief we showed that two elements were lacking here. First, here there was no agreement that the checks be deemed in accord, and second, there was no consideration or "dispute" sufficient to support an argument for an accord.

On the second point the carriers try to find evidence to support a finding or inference of dispute by the statement that "Mr. Hancock did not agree" with Mr. Deal. *But there is not the slightest suggestion of testimony that Hancock ever communicated his disagreement to Deal or any-*

one else. On the contrary, the uncontradicted testimony is that Deal tried to get a statement out of Hancock (R. pp. 215, 206, 208-9). But was unsuccessful. Hancock expressly admits this (R. pp. 232-3, 235, 237). Deal said "there was not any controversy because there wasn't anybody to fight with me about it" (R. p. 214).

Letters From the Carriers in Evidence Show that They Did Not Consider the Cashing of the Checks to Constitute an Accord or Satisfaction.

In our opening brief (pp. 54, 56, 59-63) we cited cases in support of the elementary principle that there can be no accord or satisfaction unless the parties agree that the check shall constitute an accord. The cases say there must be an "explicit understanding," "a consent or meeting of the minds," that the check is accepted in full payment.

We cited the record to show that there was no "understanding" and quoted Hancock's testimony that the checks were subject to correction (R. p. 215).

That this was the understanding of the carriers, that the checks were not intended to close the rights of the men to their wages is shown by letters sent by each of the carriers to counsel for the men after written demand was made for compliance with the judgment.

In our letters of January 9, 1929 (R. p. 193), to the carriers, written a few months after the checks in question were issued, we called attention to various violations of the judgment by the carriers. Referring specifically to the wages involved in this appeal we said:

> "We are informed that you have not paid the back pay due from March 1, 1928, in full.
>
> "You will recall that notwithstanding the Arbitration Award required you to put in the eight-hour day

as of November 1, 1927, you refused to observe the award, but on the contrary took an appeal therefrom and during the appeal did not put the eight-hour day into effect. While the appeal was pending by stipulation between us, which was incorporated in the judgment, it was agreed that if the order of the court was affirmed, the award, so far as hours were concerned, would be effective as of March 1, 1928, instead of November 1, 1927. Upon the appeal being affirmed, the rule as to hours was effective as of March 1, 1928.

"In all cases, therefore, where on and after March 1, 1928, you employed men on a 12-hour basis you became liable, in accordance with our stipulation and the judgment of the court, for overtime for the four hours each day that the men worked over eight hours.

"This, therefore, is to make formal demand upon you to comply with said judgment and the agreements between the parties with respect to the matters discussed."

Here is a plain statement of the basis of the present proceeding. If there had been a previous accord and satisfaction, if the checks were intended to foreclose any examination of the question as to whether or not the wages under the judgment had been fully paid or not, it would have been a simple thing to say so.

But of course no such result was intended. Counsel and the carriers knew that the pay checks had always been subject to correction and that these very checks were subject to correction.

Both carriers invited discussion. They did not even claim that the matter had theretofore been settled. The letter to the Southern Pacific Company was answered by Mr. Hancock's superior, F. L. Burckhalter, a copy having gone to Mr. Booth (R. pp. 195 and 199). The letter to the

Northwestern Pacific Railroad Company was answered by Messrs. Orrick, Palmer & Dahlquist.

Said the letter (R. pp. 201-202):

> "You refer to three alleged violations on the part of this company: First, that the men formerly working on the twelve-hour day have not received the proper amount of back pay in accordance with the agreement of the parties. We have taken this matter up with our steamship officials and, in our opinion, the payments which we have made to the men covering this back pay feature fully comply with the terms of the award and agreement."

Note that there is here no attempt to ignore the award, but rather a claim to "comply with the terms." If we are not satisfied we are invited to discuss the matter. No suggestion is raised that the matter was disposed of by cashing the checks. The letter concludes:

> "In the event that you desire to discuss with us any of the matters referred to in your letter, we would be glad to arrange a conference at which the contentions of both parties concerning the points raised in your letter could be thoroughly discussed."

The Southern Pacific letter states:

> "Your letter January 9th, with reference to alleged noncompliance with the judgment rendered by United States District Court on Sept. 29, 1928 in case of the A. T. & S. F. Ry. Co. et al. versus the Ferryboatmen's Union of California.
>
> "We know of no provision of the award of the Board of Arbitration nor in the judgment of the U. S. District Court referred to by you which would require this company to compensate its employes on the ferryboats on the basis recited in the next to last paragraph of your letter.
>
> "Please be assured that this company has allowed to its employes referred to by you back pay allowance

in accord with the provisions of the rules of the award of the Board of Arbitration.

'If you know of any rules in such arbitration award which support the claim contained in your letter we shall be glad to have you refer to same more specifically as the quotations of certain portions such award and judgment of the court as mentioned in your letter do not support your contention for the reason that nowhere in such quotations is mention made of basis of compensation.''

Note that there is no claim of settlement of any amount in dispute. There is no suggestion of an accord or satisfaction. On the contrary, the men are assured of the company's belief that it has acted ''in accord with * * * the award'' and the men are invited to refer the company to the provisions of the judgment relied on.

Would the carriers have invited discussion of the judgment if there was any idea that discussion had been foreclosed by a previous agreement for an accord and satisfaction.

VIII.

Costs Should Not Have Been Allowed the Carriers as Their Breach of Contract Made the Legal Proceedings Necessary.

In our opening brief (p. 76), we argued that costs should not have been allowed against the men because they were in good faith trying to settle what wages were due them and that the difficulties were due to the fact the carriers had violated their agreement to put the award into effect immediately.

The carriers say (p. 99), ''it is not true'' that they violated any agreement to abolish 12-hour watches upon the

rendition of the award. This agreement has already been quoted earlier herein and is found in the arbitration agreement (R. p. 86).

The carriers protest there was no agreement not to resort to the courts and that they should not be penalized for resorting to the courts.

Of course the carriers had the right to appeal to the courts. But when they signed the arbitration agreement they knew that the exercise of that right would take many months. Yet they agreed to make the award

> "effective on the first day of the month following the date on which the award is filed" (R. p. 86).

Pending the appeal they should have observed the agreement to make the award effective and there would have been no problem of enforcing the abolition of 12-hour watches retroactively.

The carriers broke their word in a gamble to reverse the award on appeal. The carriers lost that gamble and the men should not be penalized for seeking judicial construction of the difficulties thus created by the carriers breach of agreement. The costs of determining legally the effect of the carriers' violation of contract should not be assessed against the men.

Conclusion.

The judgment and the award plainly abolished 12-hour watches. Under the arbitration agreement, the 12-hour watches should have been abolished nearly a year prior, to wit, in November, 1927. The judgment says the abolition

of 12-hour watches was "effective as and from March 1, 1928" (the later date being fixed by stipulation).

The carriers are forced to argue that notwithstanding the agreement for immediate action on the award, notwithstanding the plain terms of the judgment, 12-hour watches were proper as and from March 1, 1928, because the award was "in suspense".

We find no warrant for the suspension—no authority is cited, no agreement to that effect claimed. We look at the suspension hypothesis as a fallacious argument devised to justify a breach of faith on the part of the carriers, a plain ignoring of specific terms of the judgment, as an attempt to make the men pay for the carriers' gamble to maintain as long as possible by appeal to the courts the barbarous and inhuman checkerboard system of 12-hour watches.

The facts as to what the carriers did are undisputed. The hours worked by the men are undisputed. The rate of pay called for by the judgment is undisputed. This court should therefore reverse the decrees below and the trial court ordered to enter judgment with interest for the unpaid wages due the men.

Dated, San Francisco,
May 13, 1936.

Respectfully submitted,
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